

ANSWERS (HOPEFULLY!) TO THE ENR SECTION'S ETHICS QUESTIONS

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1

Ex Parte Contacts

Ex parte contacts with Board/Agency
members who will be in an
Adjudicatory Role



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2

I.R.P.C. 3.5

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.



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I.R.P.C. 3.5, Comment [2]

Commentary

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.



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Idaho Code of Judicial Conduct

Rule 2.9

Ex Parte Communication

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for **scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:**

(a) The judge reasonably believes that no party will gain a **procedural, substantive, or tactical advantage** as a result of the ex parte communication; and



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Rule 2.9 Continued

Ex Parte Communication

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge. . . .



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Rule 2.9 Continued

Ex Parte Communication

(7) A judge may initiate, permit, or consider any ex parte communications when expressly authorized by law to do so.

(B) An **electronic communication sent simultaneously** to the judge and all parties or their respective lawyers is **not an ex parte communication**, nor is a **written communication** that is served **substantially simultaneously** upon the judge and all parties or their respective counsel prior to any staffing, hearing, trial, or other court proceeding at which the written communication may be relevant.

(C) If a judge receives an **unauthorized** ex parte or other prohibited communication bearing upon the substance of a matter, the judge shall promptly make provision to notify the parties of the substance of the communication and provide the parties with an opportunity to respond. If the communication was in writing, the judge shall promptly provide a copy to the parties. . . .



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Discussion Topics

1. Purpose – To prevent gaining an unfair advantage. Lawyer's motivation is irrelevant. Watch listserves if judges are subscribers.

2. Scope - It is accepted that the Rule applies to tribunals Comment 1. I.R.P.C. 1.0 is the definition of tribunal, and includes administrative agency and law judges, etc.



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Discussion Topics

3. Administrative/Procedural Matters –

General test – resolution of the issue does not provide the party with a strategic, tactical or procedural advantage. Think this through before contact.



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Discussion Topics

4. Idaho Code of Judicial Conduct - Rule 2.9 –

Should be considered in context of whether a contact is authorized by court order.

5. Judge Initiated Contact - If it is a judge initiated improper ex parte contact, we have an obligation to refuse to participate in the discussion or request that opposing party/counsel participate or be notified.



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Discussion Topics

6. Written Submissions – Judicial Conduct Rule 2.9 and I.R.P.C. 3.5 require these to be submitted simultaneously to opposing counsel. Last minute submissions may not provide sufficient notice and may be a prohibited ex parte contacts. Think about these too, it is not automatic.



11

11

Discussion Topics

7. TRO – May be authorized by law, but when you know party or counsel, you should provide notice. See Purpose.

8. When the Hearing Officer is Also the Agency Hearing - Particularly difficult for agency counsel. Should not communicate ex parte with “client” during prosecutorial phase and review phases. Consult statutes, they may allow advice to administrative judges.



12

12

I.R.P.C. 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer **shall not communicate about the subject of the representation** with a person the lawyer **knows** to be represented by another lawyer **in the matter, unless** the lawyer has the **consent** of the other lawyer **or is authorized to do so by law or a court order**.



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Commentary

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.



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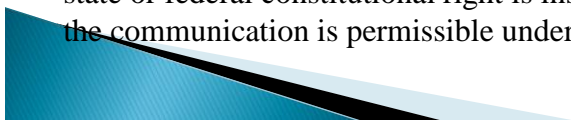
[4] **This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.** Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. *See* Rule 8.4(a). **Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.**



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[5] **Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.** Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.



16

16

Purposes

1. Preserve attorney-client relationships.
2. Protect clients from overreaching by opposing counsel.
3. Protect confidentiality



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Subject of the Representation – Matter

Any civil, criminal, administrative, investigative or transactional matter.

Matter is more case specific than subject matter.



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When Does a Lawyer Know Someone is Represented

I.R.P.C. 4.2, Comment: [8] The prohibition on communications with a represented person only applies in circumstances where the lawyer **knows** that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). **Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.**

I.R.P.C. 1.0(f): ‘Knowingly,’ ‘known,’ or ‘knows’ denotes **actual knowledge** of the fact in question. **A person’s knowledge may be inferred from circumstances.**

Fact that there is an In-House counsel is not always sufficient knowledge to know an employee is represented.



19

19

When Can A Lawyer No Longer Be Said To “Know” a Person Is Still Represented?

Client cannot waive I.R.P.C. 4.2

ABA Formal Ethics Opinion 95-396 – Lawyer should seek confirmation when represented person says he has discharged counsel.

Rule 4.2 does not impose a duty to ask whether a person is represented, but Comment 8 admonishes that we can’t close our eyes to the obvious.



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The Dilemma

Contacting Opposing Company's Employees

Constituents. Comment 7 to I.R.P.C. 4.2 prohibits communications with a constituent of the organization.



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Constituents Defined

1. Supervises, directs or regularly consults with the organization's lawyer concerning the matter; OR
2. Has authority to obligate the organization with respect to the matter; OR
3. Whose act or omission in connect with the matter may be imputed to the organization for purposes of civil or criminal liability.

AND

In communicating with a current or former constituent, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* I.R.P.C. 4.4.



22

22

How Has Substantive Case Law Defined Constituent?

Evidentiary and agency law principles.

Different tests:

1. Control group
2. Speaking authority
3. Management – speaking authority
4. Party opponent admission
5. Litigation control group
6. Alter Ego
7. Power to settle



23

23

Question Employee At The Beginning of Conversation

1. Are you represented?
2. What is your status with organization?
3. Have you discussed the matter with counsel (don't invade I.R.P.C. 1.6 confidential information or attorney-client privilege) (I.R.P.C. 4.4 is the basis that prohibits invasion of privilege).

No blanket representation by organization's counsel is recognized.



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Timing Issues

Rule 11 before suit, after suit less rationale. Related issue is how to defend opponent's contention that claims have no basis when employees choose to exercise their right to not talk to counsel.



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I.R.P.C. 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is **not represented by counsel**, a lawyer **shall not state or imply that the lawyer is disinterested**. When the lawyer **knows or reasonably should know** that the unrepresented person **misunderstands** the lawyer's role in the matter, the lawyer shall make reasonable efforts to **correct the misunderstanding**. The lawyer **shall not give legal advice to an unrepresented person, other than the advice to secure counsel**, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.



26

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Strategies for Dealing with Unrepresented Parties

- 1) Identify your client;
- 2) Identify they are the opponent and how you are adverse;
- 3) The only advice I can give you is ;
- 4) Pro Se is distinct from I.R.P.C. 4.3.



27

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REQUEST FROM THE SECTION

Please discuss conflicts regarding joint representation of clients, i.e., two organizations represented by the same lawyer in litigation and what happens when their interests diverge later. This is often referred to as a latent conflict.



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I.R.P.C. 1.7

CONFLICT OF INTEREST: CURRENT CLIENTS

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.



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The withdrawal dilemma is often dependent upon the length of the representation before the conflict is discovered and amount of confidential information gained from the joint clients and is based on IRPC 1.8(b) and 1.9(c).



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I.R.P.C. 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS SPECIFIC RULES

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.



31

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I.R.P.C. 1.9 DUTIES TO FORMER CLIENTS

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.



32

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I.R.P.C. 1.7

COMMENT 4

If a conflict arises **after** representation has been undertaken, the lawyer **ordinarily must withdraw** from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). *See* Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. *See* Rule 1.9.



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I.R.P.C. 1.7

COMMENT 5

Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, **might create conflicts in the midst of a representation**, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. **Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict.** The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c).



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I.R.P.C. 1.7

COMMENT 29

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. **Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.**



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I.R.P.C. 1.7

COMMENT 31

..... The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.



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It is possible, albeit difficult, to obtain consent to a future conflict, but that type of consent is not typically appropriate for “latent” conflicts.



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I.R.P.C. 1.7

COMMENT 22 –Discusses future conflicts and provides, in part:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict.



38

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I.R.P.C. 1.7

COMMENT 22 - Discusses future conflicts and provides, in part:

If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. **In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).**



39

39